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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 652

McALLISTER LIGHTERAGE LINE, INC.,
Appellant,

vs.

MARY RIVAS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF JOSE RIVAS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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McAllister Lighterage Line, Inc. prays that a Writ of Certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on November 16th, 1945, which affirmed a judgment of the District Court for the Southern District of New York, in favor of the appellee.

Opinions Below

The District Court filed no written opinion. The opinion of the United States Circuit Court of Appeals for the Sec-

ond Circuit is as yet unreported but has been added to the record (R. 227).

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Statute Involved

Section 33 of the Act of June 5th, 1920, Chap. 250, 41 Stat. 1007, 46 U. S. C. 688, commonly known as the Jones Act, provisions of which are set forth in the appendix, is involved.

Summary Statement of Matter Involved

The action was brought in the United States District Court for the Southern District of New York, under the Jones Act (R. 4) by the widow of Jose Rivas, to recover damages for the loss of life of Jose Rivas, a fireman aboard the Lighter Express, who was found dead in the fire room of the vessel on the morning of August 24th, 1943 (R. 110). There were no witnesses to the accident which is alleged caused his death (R. 199).

Plaintiff's counsel made no opening statement to the jury and ignored the Trial Court's suggestion that he give the jury "some kind of an idea what this situation is" as the trial progressed (R. 17). At the end of the case, neither the plaintiff's counsel, defendant's counsel nor the Court knew "what particular negligence of the defendant the plaintiff was relying on" (R. 197, 201). Fairness under our system demands that a defendant be informed (at least during the trial) of the charge of negligence under which it is to be held liable. The Circuit Court of Appeals has written an opinion in which it neither cites nor discusses a single case or authority, and has itself speculated on the

cause of the accident. There is no person today who can say how the accident happened, much less state what the negligence of the defendant was and whether or not it was the competent producing cause of the said accident.

This petition for a Writ of Certiorari involves only questions of law, which, as set forth on page 5, relate to (a) whether the requisite proof necessary for a recovery under the Federal Employers' Liability Act established by decisions of this Court, is necessary to the same extent for a recovery under the Jones Act; (b) whether the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in *Brady* v. *Southern Railway Co.*, 320 U. S. 476, *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 496; (c) whether the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642; (d) in an action under the Jones Act, whether the testimony of an expert witness, who assumes facts contrary to the facts stated in the hypothetical question, and who then adds other facts concerning which there is no testimony whatsoever and gives his opinion as to a cause of an accident, is sufficient to warrant the trial Court in submitting the case to the jury; and (e) whether there was error in the ruling holding the case properly submitted to the jury by the trial Court.

The theory upon which the case was submitted to the jury was that before the vessel started to move, the engineer Larsen moved the links which struck the deceased while he was standing up on a guard rail surrounding the eccentrics and that he was not warned by the engineer.

There is not one word of testimony in the whole record that the engineer ever moved the links before the vessel started to move. In fact the engineer Larsen testified to just the opposite, namely, that the crank was in a good position for starting (R. 60) and this fact was assumed in the hypothetical question propounded by the plaintiff to the expert (R. 175). Further, there is no dispute that the movement of the links which plaintiff claims struck the deceased would put the engine in a reversing position. The only testimony in the whole record that the links were ever shifted to a reversing position was just prior to the vessel being stopped.

After the engineer had testified, the plaintiff called an expert and a long hypothetical question was propounded to him which assumed among other things that "the crank of the engine was in a good position for starting" (R. 175). In answering this hypothetical question the expert assumed just the opposite, namely, that the crank was not in a good position for starting and that the deceased was struck by the links being moved into a reversing position in preparation for starting (R. 178). This could not be so because the vessel first moved forward and there is no testimony indicating that there was any necessity for the links being so moved.

Furthermore, this expert assumed two additional facts not stated in the question, namely, that the deceased at the time was standing up on a guard rail around the eccentrics (R. 182) and that deceased was not injured after the engine had been operating (R. 180). There is not one word of testimony in the record concerning these two assumed facts.

We respectfully submit that when a theory of an action is predicated upon an opinion of an expert who assumes the opposite of the facts proved and adds others concerning which there is no testimony, the plaintiff has not made out a

case. To submit such a situation to a jury calls for nothing less than mere speculation and conjecture, and violates the rule of this Court in cases decided under the Federal Employers' Liability Act.

The Questions Presented

(1) Whether the requisite proof necessary for a recovery under the Federal Employers' Liability Act established by decisions of this Court, is necessary to the same extent for a recovery under the Jones Act.

(2) Whether the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in *Brady* v. *Southern Railway Co.*, 320 U. S. 476; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

(3) Whether the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642.

(4) In an action under the Jones Act, whether the testimony of an expert witness who assumes facts contrary to the facts stated in the hypothetical question and who then adds other facts concerning which there is no testimony whatsoever and gives his opinion as to a cause of an accident, is sufficient to warrant the trial Court in submitting the case to the jury.

(5) Whether there was error in the ruling holding the case properly submitted to the jury by the trial Court.

Reasons for Granting the Writ

While this Court has written concerning the necessary proof in death actions brought pursuant to the Federal

Employers' Liability Act, it has not written, so far as research discloses, on the necessary proof in a death action brought under the Jones Act. It would seem clear there should be no distinction between the two Acts, yet the Circuit Court of Appeals in this case has refused to follow the law laid down by this Court in the cases involving the Federal Emplcyers' Liability Act. *Brady* v. *Southern Railway Co.*, 320 U. S. 476; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

In the three cases cited hereinabove, this Court has laid down the definite and unequivocal rule that in death actions brought under the Federal Employers' Liability Act, a case should not be submitted to a jury where the jury's verdict would rest only upon speculation and conjecture either as to negligence or proximate cause.

In the case at bar, not only did the Trial Court permit the jury to speculate upon the issues of negligence and proximate cause, but also the Circuit Court of Appeals for the Second Circuit not only has confirmed the guesswork of the jury but also has proceeded itself to speculate on the cause of the accident.

The basic issues here are matters of general public importance because there are pending many cases brought pursuant to the provisions of the Jones Act and the Admiralty Bar generally should be informed by this Court with reference to these matters.

The Circuit Court of Appeals for the Fifth Circuit has reached the conclusion that the decisions of this Court involving death actions brought pursuant to the Federal Employers' Liability Act, are equally applicable to death actions brought pursuant to the provisions of the Jones Act, as shown by the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S.

642. The opinion of the Circuit Court of Appeals for the Second Circuit, in the instant case, is opposed to and in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. This conflict should be finally resolved by a decision of this Court in the public interest not only of uniformity of decision in the various Circuits but as stated hereinbefore so that the Admiralty Bar may be fully informed concerning this important question. The case at bar is a typical example of the frame of mind which experience shows prevails among the Trial Judges and Judges of the Circuit Court of Appeals in the Second Circuit that in death actions the Jones Act is to be applied almost as a Workman's Compensation Act.

The Circuit Court of Appeals refused to discuss any legal problem except whether there was sufficient evidence to support the verdict which, of course, is an issue of law. The Circuit Court reviewed the testimony in detail and in reciting the facts, it embraced all of the important facts testified to by the engineer Larsen, except the vital one and upon this one the Circuit Court said his testimony should be disbelieved. The burden of proof is on the plaintiff in an action of this character, and the absence of proof cannot be supplied by discrediting or disbelieving the only witness to the facts. This Court clearly so held in *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 485.

The Circuit Court admitted that if there was a theory other than that upon which the Court and jury speculated, which theory would agree with the facts equally well, the plaintiff must fail. One of the theories which the Court itself expounded could not be ruled out of consideration entirely even by the Circuit Court. It said that under the circumstances it was doubtful whether the decedent was killed by other parts of the moving machinery but could state no facts lending weight to that doubt. The Circuit

Court's doubt in this regard is suggested to be based on the fact that if Rivas had been standing on the floor, the speed of the eccentric rods laterally might not be sufficient to cause the severe injury but the Court refused to discuss whether such a blow could come from the eccentric rods if the decedent was standing on the guard rail so that his head would be high enough to be struck with the lateral force of the eccentric rods.

The balance of the Circuit Court's opinion is based upon discussing another theory arising out of medical testimony concerning how long the decedent probably lived after he was struck the blow. This is really an attempt to apply a scientific theory of time to a case where there never was any definite time fixed for any event and by reading a doctor's testimony in the most peculiar fashion. A doctor testified that the decedent could not have lived more than a few minutes after the blow was struck and could not have lived more than five or ten minutes at the most (R. 140). The Circuit Court has said this testimony means it was the doctor's opinion the decedent lived a minimum of five minutes after he was struck the blow which killed him.

While there is no reference to the fact in the opinion of the Circuit Court of Appeals, the only reason this case ever was submitted to the jury in the first place was because a theory was involved by a marine engineer. His thoughts are re-expressed in part in the opinion of the Circuit Court yet plaintiff's counsel was compelled to abandon the expert's testimony on the appeal and one would never know from reading the Circuit Court's opinion that such an expert had ever testified at the trial.

Conclusion

The decision below is incorrect. It decided a question of substantial general importance that is in conflict with applicable decisions of this Court and in conflict with the

decisions of the Circuit Court of Appeals for the Fifth Circuit and generally deals with a problem which should be clarified by the decision of this Court for the benefit of the Admiralty Bar.

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Edward J. Behrens,
Counsel for Petitioner.